DARRELL RATHKAMP
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-21-A Decided March 24, 1993

Appeal from an assessment of damages for livestock trespass.

Affirmed in part, reversed in part.

1. Indians: Leases and Permits: Farming and Grazing

Damages for livestock trespass on trust or restricted property are properly determined in accordance with the formula set forth in 25 CFR 166.24.

2. Indians: Leases and Permits: Farming and Grazing

Trespass damages can be assessed against any person whose livestock is found on trust or restricted property for which that person does not have an approved grazing permit.

APPEARANCES: Martin J. Elison, Esq., Hardin, Montana, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Darrell Rathkamp seeks review of a September 15, 1992, decision of the Acting Billings Area Director, Bureau of Indian Affairs (BIA; Area Director), assessing appellant $660.64 in damages for livestock trespass on Crow Allotment 1205. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and reverses it in part.

Background

On May 10, 1991, the Superintendent of the Crow Agency, BIA (Superintendent), notified appellant that cattle bearing his brand were trespassing on Allotment 1205, in violation of 25 CFR 166.24. 1/ On June 11,

1/ Section 166.24 provides in pertinent part:
"(a) Acts prohibited on Indian trust, restricted or Government lands. The following acts are prohibited on Indian trust or restricted lands under the jurisdiction of the Bureau of Indian Affairs:
"(1) The grazing upon or driving across any individually owned,

1991, the Superintendent notified appellant that his cattle had again been observed in trespass on Allotment 1205. The letter states:

> Crow Indian Agency staff have observed livestock in the allotment on May 8 and June 6, 1991. Because the livestock are still grazing in trespass, the regulation found in 25 Code of Federal Regulations 166.24 is being assessed. This regulation provides that the owner of livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1.00 per head per day, together with a reasonable value of forage consumed ($8.25 per animal unit month [AUM]) and damages to property injured or destroyed. Because you have not attempted to remove the livestock from Allotment 1205, the penalties will be assessed.

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fn. 1 (continued)
tribal, or Government lands of any livestock without an approved grazing or crossing permit.

"(2) Allowing livestock to drift and graze on trust or restricted Indian lands without an approved permit.

* * * * * *

"(b) Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass * * *, together with the reasonable value of forage consumed by their livestock and damages to property injured or destroyed, * * *. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid * * *.

* * * * * *

"(d) Settlement. The amount due the Indian landowner and/or the United States in settlement for unauthorized grazing use shall be determined by the Superintendent as follows:

"(1) A penalty of $1 for each animal thereof for each day of trespass, * * *.

"(2) A reasonable value of forage consumed based upon the average rate received per month for comparable grazing privileges on the reservation for the kind of livestock concerned, or the estimated commercial value for such privileges if no comparable grazing privileges are sold.

"(3) Damages to Indian or Government property injured or destroyed.

"(4) All expenses incurred in gathering, impounding, caring for, and disposing of livestock in cases which necessitate impoundment under § 166.24(f).

"(5) Neither the imposition of any civil penalty nor any action by the Secretary of the Interior shall preclude either any civil action by the United States, an Indian, or an Indian tribe for damages caused by trespassing livestock or prosecution for any offense involved with such trespass."
(Emphasis in original).

The penalty for trespass is:

1. 100 head of cattle in Allotment 1205 on May 8, 1991		$100.00
2. 73 head of cattle in Allotment 1205 on June 6, 1991		73.00
	Total	$173.00

The value of forage consumed is:

1. 60 head of cows in Allotment 1205 on May 8, 1991
   60 head x 1 day x 8.25/AUM
   30 days
   16.50

2. 39 cows and one bull in Allotment 1205 on June 6, 1991
   39 AUMS (cows) + 1.5 AUMS (bull) x 1 day x $8.25/AUM
   30 days
   11.14

Total $ 27.64

Damages to property injured or destroyed:

* * * [T]he current lessee * * * is unable to utilize this lease until the livestock are removed and your share of the fence is built. Damages equal the annual rental payment of $460.00 that the 115 acres generates at $4.00 per acre.

Enclosed is the Bill for Collection for $660.64 for trespass penalties, forage consumed, and damage to property injured or destroyed. You have three (3) days after you receive this letter or a copy of this letter to make payment in full for the Bill for Collection and to remove the livestock. Payment must be by cashier's or certified check or money order.

Because of a controversy over the proper lessee on Allotment 1205, the trespass assessment was informally stayed until after January 9, 1992, when the Board issued its decision in Rathkamp v. Billings Area Director, 21 IBIA 144 (Rathkamp I). In that case, appellant argued that some of the signatures on a lease negotiated with the landowners by Mac Castillo were forgeries. The Board remanded the case to BIA for further consideration.

A meeting between appellant, Castillo, the landowners, and BIA was held on March 11, 1992. The landowners at that meeting indicated that they wanted to lease the allotment to Castillo. The landowners were informed that unless they each returned a notarized statement to that effect to BIA by March 20, 1992, the allotment would be put up for bid in the next general lease advertisement. If the statements were returned, the allotment would be leased to Castillo for the period October 1, 1990, through September 30, 1995.

Because not all of the landowners returned the required statements, the lease was put up for bid in May 1992. The new lease was to commence October 1, 1992. 2/

By letter dated May 21, 1992, the Superintendent informed appellant that the 1991 trespass assessment would be collected. Appellant appealed this decision to the Area Director, who affirmed it on September 15, 1992.

Appellant simultaneously filed a notice of appeal and a statement of reasons with the Board. The Area Director did not file a brief.

Discussion and Conclusions

The administrative record indicates that Allotment 1205 had been leased to the former owner of the adjoining fee land, who had apparently used both his own land and the allotment for grazing. The adjoining fee land was sold to appellant, who states that there was no fence between certain portions of the property he purchased and approximately 25 acres of Allotment 1205, and between other portions of the property and the reminder of the allotment. Consequently, any cattle on appellant's property had access to the allotment.

Appellant contends that he had only 30 cows with calves and 1 bull in the pasture having access to 25 acres of Allotment 1205. He further states that his cattle had hundreds of acres of his property upon which to graze and were never all on the 25-acre portion of the allotment at the same time.

Appellant appears to be arguing first that the count of his cattle on Allotment 1205 on June 6, 1991, was high by 9 cows and 3 calves. The count is supported by the trespass field report in the administrative record, which indicates that 39 cows, 33 calves, and 1 bull were in trespass. Appellant has submitted nothing to substantiate his allegation that he had only 30 cows with calves, and 1 bull with access to Allotment 1205. Appellant has failed to show that the BIA count was incorrect. See Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, 22 IBIA 153, 157 (1992); Ames v. Acting Billings Area Director, 20 IBIA 246, 247 (1991), and cases cited therein.

The amount of acreage owned by appellant is irrelevant to a determination of whether or not appellant's cattle trespassed on Allotment 1205. It is a well-known fact, of which the Board takes administrative notice, that cattle will go wherever they please unless they are restrained by fences. If appellant's cattle had access to Allotment 1205, the mere fact that they also had access to appellant's property does not prove that they stayed on appellant's property.

2/ The lease was awarded to appellant as a result of the May 1992 advertisement. This award is presently the subject of an appeal to the Board. Blackhawk v. Billings Area Director, Docket number as yet unassigned.

Appellant also apparently suggests that not all of his cattle were on the 25-acre portion of Allotment 1205 at the same time. The Board does not know how many cattle appellant owns, and therefore makes no finding as to whether or not "all" of his cattle trespassed on the allotment. Neither does the Board know which portion of the allotment, as described by appellant, his cattle were on. The administrative record, however, supports the determination that 100 head of cattle were on the allotment on May 8, 1991, and that 73 head of cattle were on the allotment on June 6, 1991. Appellant has not shown otherwise.

Appellant contends that the decision was not based on a factual assessment of actual trespass. In support of this argument, appellant notes that the decision states that 100 head of cattle trespassed on May 8, 1991, and 73 head of cattle trespassed on June 6, 1991, but assesses damages for forage consumed for only 60 cows on May 8, 1991, and 39 cows and 1 bull on June 6, 1991. Appellant's statements appear to indicate that he believes the decision is facially inconsistent.

[1] As previously mentioned, the administrative record contains the trespass reports upon which the Superintendent relied. The May 8, 1991, report shows 60 cows and 40 calves in trespass, while the June 6, 1991, report shows 39 cows, 33 calves, and 1 bull in trespass. The assessment, which was calculated in accordance with 25 CFR 166.24, included damages of $1 per head, per day of known trespass. It also included damages for forage consumed. This latter calculation was made on the basis of AUM's, rather than actual head of cattle. One AUM is defined as the amount of forage consumed by 1 cow with unweaned calf by her side, or the equivalent, for 1 month. See Fort Berthold Land & Livestock Ass'n v. Aberdeen Area Director, 8 IBIA 230, 234, 88 I.D. 315, 317 (1981). The Superintendent properly considered only the cows and bull in calculating damages for forage consumed. The Board finds that the trespass assessment was properly based upon the formula set forth in 25 CFR 166.24 and that there was no error in the calculation of damages.

[2] Appellant contends that 25 CFR 166.24(d) does not apply to this case for three reasons. He first argues that section 166.24(d) was not triggered because there was an approved grazing permit for Allotment 1205 pursuant to section 166.24(a)(1). It appears that appellant believes that section 166.24(a) precludes BIA from assessing trespass damages against one person if any other person has an approved grazing permit covering the allotment at issue. This is incorrect. Trespass damages can be assessed against any person whose livestock is found on trust or restricted property for which that person does not have an approved grazing permit. Appellant has not offered any evidence that he had an approved grazing permit covering Allotment 1205 on May 8 and June 6, 1991. See further discussion, infra. Therefore, trespass damages could properly be assessed under section 166.24.

Appellant's two additional arguments for the inapplicability of section 166.24(d) are that BIA cannot assess penalties when a private party holds the lease, but rather that private party must seek damages through

state or tribal court; and that the section refers to damages to the Indian landowner and/or the United States, not to payment to private lessees, and was not intended to be used as a free collection agency for private disputes. These arguments apparently revolve around appellant's belief that some or all of the penalties and damages assessed against him might be paid to Castillo. Initially, the Board holds that the identity of the person or persons to whom BIA ultimately pays the monies collected as trespass damages is irrelevant to the question of whether or not damages are due and owing.

Payment of certain trespass damages to a lessee is specifically permitted under 25 CFR 166.24(b), i.e., damages for the value of forage or crops consumed or destroyed, not to exceed the rental paid. See, e.g., Kimmet v. Billings Area Director, 22 IBIA 148 (1992); Kimmet v. Billings Area Director, 19 IBIA 72 (1990). The Board sees no reason to alter its interpretation of the regulation as granting BIA discretion to pay monies collected for livestock trespass to the lessee of the allotment, to the extent authorized by subsection 166.24(b).

Appellant contends that no damages should be assessed because he was the rightful lessee of Allotment 1205 and the damage assessment is being made for the benefit of a person who obtained possession of the lease for a short period of time through fraud and forgery. It appears that this argument is that because the lease has now been awarded to appellant, he could not damage himself.

The Board notes that the trespass occurred in May and June 1991, at a time when the approved lessee was not appellant. The lease which appellant has been awarded, and which is the subject of the Blackhawk appeal, took effect on October 1, 1992. Appellant was not the lessee of Allotment 1205 in May and June 1991. 3/

Appellant argues that because none of his cattle trespassed on 95 acres of Allotment 1205, that acreage was not damaged, and therefore he should not have been assessed the annual rental for Allotment 1205 because there is no proof that any trespass destroyed the entire value of the allotment for a full year. Furthermore, appellant argues that inability to use the allotment is not "damage or destruction," and no penalty can properly be imposed. He contends that because the allotment was not fenced when it was leased, neither the lessee nor BIA can force him to build a fence.

The Superintendent's June 11, 1991, initial assessment, quoted, supra, tied the assessment of the annual rental to the "damage to property injured or destroyed" provision of the regulation. However, neither the Area Director's decision nor the administrative record show how the

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3/ Furthermore, the Board did not conclude in Rathkamp I that Castillo's lease had been obtained fraudulently. It found only that there were enough questions surrounding the negotiations for the lease that BIA had a duty to investigate further.

lessee's non-use of the allotment constitutes injury to or destruction of Indian or Government property. Consequently, the Board finds that this item of assessed damages is not supported by the record and must be reversed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 5, 1992, decision of the Acting Billings Area Director is affirmed in part and reversed in part. The damage assessment is reduced to $200.64.

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Kathryn A. Lynn
Chief Administrative Judge

I concur:

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Anita Vogt
Administrative Judge